No. 33527

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ST. LUKE'S UNITED METHODIST CHURCH,

Plaintiff,

MARY MAXINE WELCH,

Plaintiff-Appellant,

and JAY-BEE PRODUCTION COMPANY,

Plaintiff,

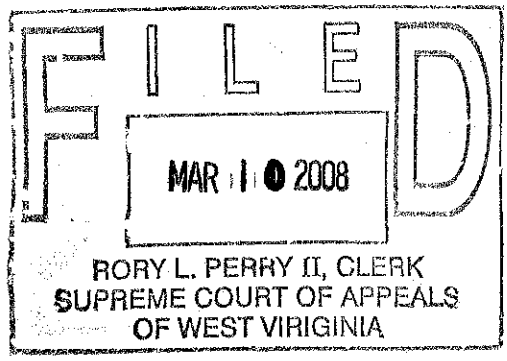
v.

CNG DEVELOPMENT COMPANY,

Defendant-Appellee,

TRI COUNTY OIL AND GAS, INC., EAST RESOURCES, INC., and ENERVEST OPERATING, LLC,

Defendants.



BRIEF OF APPELLEE

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I. INTRODUCTION

Appellee Dominion Exploration & Production, Inc. ("DEPI"), successor to CNG Development Company, submits this response to the brief filed by Appellant Mary Maxine Welch. If this Court does not grant DEPI's separate motion to dismiss the appeal, which it should, then it should affirm the circuit court's order granting DEPI's motion to dismiss and strike the remedy of partial rescission in this action.[1] Welch is not entitled to partial rescission because rescission is not proper where a remedy at law exists. The holding of this Court in *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S.E. 124 (1912), controls this action. In *Hall*, the Court articulated the well-established rule that a remedy at law is adequate as follows:

> *Failure or refusal, while occupying the lease and operating it, to drill additional wells, under circumstances imposing a duty to do so, makes the lessee liable in damages to the lessor, for which the remedy at law is held to be an adequate one by courts in all jurisdictions, and affords no ground for either partial or total cancellation or rescission*, and this rule has been repeatedly asserted by this Court. In so far as this bill seeks cancellation for mere failure to drill additional wells, or to compel the drilling thereof, it is, therefore, clearly bad and insufficient on demurrer.

Id., 76 S.E. at 124-25 (citations omitted) (emphasis added).

As Welch admitted in her Brief of Appellant, once a paying well is drilled under a lease, the lessee has a vested interest or estate in the minerals. Br. of Appellant at p. 21. Thus, to rescind a lease would violate the basic and important legal principle that equity abhors a forfeiture. In *Adkins*

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[1]The procedural posture of this action is somewhat unique. After the circuit court rejected Plaintiffs' equitable remedies, including lease forfeiture, cancellation and termination, Plaintiffs amended their complaint to pursue identical equitable relief albeit labeled as rescission. When the circuit court concluded that its grant of summary judgment also precluded the amended complaint's demand for rescission, Plaintiffs sought this interlocutory appeal on the rescission issues. Plaintiffs' demand for monetary damages was not impacted by the rulings granting summary judgment and dismissal of the equitable remedies of forfeiture, cancellation, termination and rescission. The monetary damages issues remain for trial.

v. Huntington Development & Gas Co., 113 W. Va. 490, 168 S.E. 366, 367 (1932), this Court held that fraud, abandonment and extreme hardship are the only circumstances under which there is even a potential right to complete or partial cancellation (rescission) of an oil and gas lease. In any event, the amended complaint does not adequately plead nor has Welch offered evidence of fraud, abandonment or extreme hardship.

The Brief of Appellant cites heavily to matters outside the amended complaint that were not presented to the circuit court in response to the motion to dismiss and strike. In accordance with DEPI's pending motion to strike, the Court should strike and disregard the discussion of these matters. Moreover, Welch's discussion of these matters is futile because DEPI has demonstrated a willingness to further develop the lease at issue by attempting and offering to drill additional wells. Plaintiffs' first action after DEPI began plans to drill additional wells was to ask the circuit court to enjoin DEPI's drilling. Since DEPI's first notice of the claim and prompt offers to drill, Welch has continued to thwart DEPI's offers by twice seeking to enjoin DEPI's drilling and moving to strike DEPI's offer of judgment.

Finally, the circuit court's unchallenged order granting DEPI's previous motion for summary judgment and holding that Welch is not entitled to the equitable remedies of forfeiture, termination or cancellation applies with equal force to the equitable remedy of rescission. The circuit court aptly noted that rescission and forfeiture are similar equitable remedies and that rescission, like forfeiture, is not a proper remedy where a remedy at law exists. Order at p. 2 (Nov. 15, 2006).[2] Moreover, the

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[2]Although this order was signed and dated on November 15, 2006, it was actually entered on the circuit court's docket on May 2, 2007.

circuit court correctly concluded that DEPI was entitled to summary judgment on the equitable remedies where Plaintiffs failed to present evidence to support their allegations:

> The Court finds that plaintiffs have not alleged fraud with the particularity required by Rule 9 of the West Virginia Rules of Civil Procedure, nor with the sufficiency to meet the requirements for a remedy of rescission. In addition, the Court finds no evidence of lease abandonment as EnerVest Operating, LLC is currently operating three active oil and gas wells on the lease. The Court further finds no evidence of undue hardship on plaintiffs.

Id. at p. 3.

Therefore, if this Court retains jurisdiction, it should affirm the order of the circuit court.

II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Plaintiffs Jay-Bee Production Company ("Jay-Bee"), St. Luke's United Methodist Church ("St. Luke's"), and Welch initiated this action by filing a two-count complaint against CNG Development Company, Tri County Oil and Gas, Inc. ("Tri-County") and East Resources, Inc. ("East Resources")[3] in the Circuit Court of Ritchie County, West Virginia on December 31, 2003. St. Luke's and Welch each owned one-half undivided interests in the oil and gas underlying an oil and gas lease (the "Flanaghan Lease").[4] The first count claimed lease abandonment based upon a breach of an implied covenant to reasonably and fully develop the Flanaghan Lease. The second count claimed lease abandonment based upon a breach of an implied covenant to protect the lessors from drainage. The complaint did not demand damages as a remedy, but instead demanded only equitable relief. Specifically, the complaint demanded that the lease be declared "forfeited, canceled, terminated and removed as a cloud upon the title to Plaintiffs' land." *See* Compl. at p. 8.

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[3]Plaintiffs voluntarily dismissed Tri County and East Resources on January 29, 2004.

[4]*See* DEPI's Memo. in Supp. of Summ. J. at Ex. A.

DEPI served an Answer on February 5, 2004, noting that Plaintiffs failed to join EnerVest Operating, LLC ("EnerVest"), who currently owns the three operating wells on the Flanaghan Lease, pursuant to an assignment and farm out agreement from DEPI.[5] *See* Answer at p. 1. DEPI further noted that forfeiture, cancellation and termination were not proper remedies where it had complied with the drilling obligations created by the Flanaghan Lease. *See* Answer at p. 9.

Plaintiffs issued no demand to DEPI to drill additional wells prior to filing the complaint, and following receipt of the complaint (which was the first notice DEPI had of the claim), DEPI undertook to obtain permits and to drill additional wells on the Flanaghan Lease. *See* Elswick Aff., Ex. No. 1 to DEPI's Mot. for Summ. J. (Dec. 3, 2004). Ironically, when DEPI started to survey additional well sites, Plaintiffs filed a motion seeking to enjoin DEPI from drilling additional wells on the Flanaghan Lease. *See* Pls.' Mot. for Relief (June 28, 2004).

The apparent reason for such inconsistent conduct by Plaintiffs was the top leases that Jay-Bee had obtained on the Flanaghan Lease from Welch dated June 2, 2002, and from St. Luke's dated September 10, 2003. *See* Compl. at ¶ 3.[6] In the absence of the termination of DEPI's lease, Jay-Bee had no rights to drill wells on the Flanaghan Lease. Thus, even though Plaintiffs sued DEPI for not drilling enough wells on the Flanaghan Lease within months of Jay-Bee's top leases, Plaintiffs

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[5]EnerVest was later joined by agreement of the parties on November 16, 2004. After the Court granted summary judgment to DEPI, Plaintiffs dismissed EnerVest on February 23, 2005.

[6]A "top lease" is the leasing by a subsequent lessee from the same lessors of a mineral interest currently under lease to another lessee. The top lessee only obtains rights by defeating the lease of the original lessee, in this case DEPI. Here Jay-Bee top leased the same oil and gas covered by the Flanaghan Lease from Welch and St. Luke's and then joined them in seeking to obtain rescission of DEPI's lease. Jay-Bee can not drill on the Flanaghan Lease while DEPI's lease remained in force as a valid lease. Thus, it remains in Jay-Bee's interest to obtain cancellation of DEPI's lease.

demanded that DEPI *not* drill any additional wells as soon as DEPI started surveying drill sites to prepare for drilling.

On December 3, 2004, DEPI served its motion for summary judgment, noting that three active wells remain in operation on the Flanaghan Lease. *See* DEPI's Mot. for Summ. J. at p. 2. DEPI further noted that the express terms of the Flanaghan Lease provided for a primary term of five years followed by a secondary term "continuing so long as oil or gas is produced in paying quantities or the rental paid." *See* DEPI's Mot. for Summ. J. at p. 2. DEPI noted that rescission was not a proper remedy for any alleged breach of implied covenants to develop or protect from drainage. DEPI further noted that the express terms of the lease only required the drilling of one well by the lessee. Despite the parties' express agreement that one well was sufficient, Plaintiffs sought to rescind the lease.

DEPI further noted that it had never received a demand from either lessor that additional wells be drilled until the filing of the complaint in December 2003. Thereafter, DEPI undertook further development of the Flanaghan Lease in an effort to satisfy Plaintiffs. *See* DEPI's Memo. in Supp. of Summ. J. at p. 3. Instead of allowing DEPI to drill additional wells, Plaintiffs moved for a preliminary injunction to prevent further drilling by DEPI. *Id.* In June 2004, and continuing through today, DEPI remains willing to drill additional wells on the Flanaghan Lease but Welch and Jay-Bee continue to object to such drilling. Astonishingly, Welch claims she is damaged by DEPI's failure to drill. *Id.*

In the motion for summary judgment, DEPI raised, *inter alia*, the following issues:

> 17. Even if plaintiffs assert a viable legal theory, *rescission of the lease is not the proper remedy for an alleged breach of implied covenants to develop or protect from drainage.*

18. The oil and gas lease . . . and the leasehold estate thereby created, have not been forfeited, canceled, or terminated and the lease remains valid.

19. Plaintiffs are not entitled to the relief requested.

DEPI's Mot. Summ. J. at ¶¶ 17-19 (emphasis added).

In response to DEPI's Motion for Summary Judgment, Plaintiffs filed the affidavits of petroleum geologist Donald Kesterson and Jay-Bee's president Randy Broda. In his affidavit, Mr. Kesterson did not set forth any facts reflecting fraud, abandonment or extreme hardship. *See* Kesterson Aff. (Dec. 14, 2004). Instead, he stated that the failure to drill more than the three existing wells on the Flanaghan Lease was a deviation from good oil and gas operating practice. *Id.* at ¶ i. Mr. Broda submitted a similar affidavit setting forth an identical conclusion.

On January 26, 2005, the circuit court held a hearing and granted DEPI's motion for summary judgment. The circuit court held as a matter of law that Plaintiffs were not entitled to the remedy of forfeiture under the allegations contained in the complaint and Plaintiffs' evidence rebutting summary judgment.[7] On appeal, Welch does not dispute the circuit court's holding that DEPI was entitled to summary judgment on her demands seeking forfeiture, termination and cancellation. *See* Br. of Appellant at pp. 40-3. The circuit court, however, granted Plaintiffs leave

[7]Plaintiffs offered no evidence of fraud, abandonment or extreme hardship to support their demand for forfeiture, cancellation, termination and removal of the Flanaghan Lease.

to amend the complaint to pursue a legal remedy for damages. *See* Tr. at p. 12 (Jan. 26, 2005).[8] The circuit court subsequently entered an order reflecting its rulings on October 7, 2005.

At the summary judgment hearing on January 26, 2005, DEPI again noted its plans to begin drilling on the Flanaghan Lease.[9] Plaintiffs again objected to DEPI's plans to begin drilling by refiling a motion for preliminary injunction on February 23, 2005. *See* Pls.' Mot. for Relief.

Plaintiffs filed an amended complaint on February 14, 2005. In an apparent attempt to resurrect the equitable remedies rejected by the circuit court on summary judgment, Plaintiffs again included an equitable remedy albeit labeled as rescission in place of forfeiture, termination and cancellation. For all practical purposes, the equitable remedies of forfeiture, termination, cancellation and rescission are similar and would result in whole or partial cancellation of the

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[8]*See* Tr. at p. 12 (Jan. 26, 2005).

THE COURT: Forfeiture, in my understanding of the current status of the law, I worked with this stuff for years, is not an appropriate remedy.

MR. LAWRENCE: May I suggest that you grant the motion as to the forfeiture count and allow the amendment as to the damage count?

THE COURT: Any objection to allowing an amendment?

MR. LAWRENCE: I think leave is to be freely given.

MR. MORRIS: We so request leave to amend.

THE COURT: *I will grant the summary judgment and find as matter of law based upon the pleadings of this matter and the evidence before the court and affidavit of both parties that forfeiture can never be a remedy* under the current status of the allegation contained by the plaintiff, but the plaintiff will be allowed to amend their complaint to seek other relief that may be viable. (Emphasis added.)

[9]*See* Tr. at pp. 12-3 (Jan. 26, 2005).

MR. LAWRENCE: With that in mind I would like to reflect in the order that the injunction essentially was an agreement by Dominion not to drill until summary judgment was -- if the forfeiture is not a remedy, we would like, Dominion desires to go out and complete the wells that are permitted for the property and would like to do that. That does not require a court ruling. I just want to make sure that plaintiffs understand that is still the intention of my client.

THE COURT: The injunction was only until such time as the matter was ruled on summary judgment and the forfeiture issue. The court would clearly find no potential for forfeiture in this case . . . .

Flanaghan Lease. In addition, the elements required for these remedies are similar and all require a showing of fraud, abandonment or extreme hardship.

The amended complaint recites that Tri County and East Resources were dismissed from the action.[10] Further, the amended complaint recites that EnerVest was joined as a new Defendant.[11] The three-count amended complaint incorporates by reference paragraphs 1 through 39 of the complaint. The first count claims a breach of the lease agreement and seeks complete or partial rescission or reformation[12] of the Flanaghan Lease. The second count claims a breach of an implied duty under the lease agreement and seeks "a measure of relief not available at law." The third count seeks money damages for the "conduct heretofore described in Counts One and Two." The amended complaint demands that the Flanaghan Lease be rescinded or reformed so that the residue of the lease not encumbered by existing wells be partially released from the original lease and a decree terminating all rights in Defendants to all acres not used by the existing wells. Alternatively, Plaintiffs demand money damages for pecuniary loss due to past and future drainage by operations on adjoining lands. *See* Am. Compl. at THEREFORE ¶ 3.

On February 23, 2005, DEPI filed a motion to dismiss and strike the demand for partial rescission in the amended complaint. In its motion, DEPI raised the issue that the remedy of partial rescission is duplicative of the remedies of forfeiture, termination and cancellation that the circuit court had previously dismissed on summary judgment.

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[10]As noted above, these Defendants were voluntarily dismissed on January 29, 2004.

[11]EnerVest was later dismissed on February 23, 2005.

[12]Welch does not argue on appeal that she is entitled to the remedy of reformation.

Prior to trial, DEPI again offered to drill up to eleven (11) additional wells on the Flanaghan Lease. *See* DEPI's Offer of J. Ex. 2 from hearing (Feb. 23, 2006). Plaintiffs again sought to challenge DEPI's plans to drill on the Flanaghan Lease and filed a Motion to Strike on February 16, 2006. In their motion, Plaintiffs asked the Court to strike DEPI's offer to drill eleven additional wells. During the hearing on February 23, 2006, the Court considered Plaintiffs' Motion to Strike, the expert testimony offered by Plaintiffs' expert Ira B. Haught, and the parties' memoranda. The Court concluded that Plaintiffs offered no valid basis to strike DEPI's offer of judgment and denied Plaintiffs' motion.

Despite DEPI's continued willingness to drill additional wells on the Flanaghan Lease, plaintiffs on three separate occasions filed pleadings seeking a Court order barring DEPI from doing so.

When the parties appeared for a bench trial on February 23, 2006, the circuit court held a hearing and granted DEPI's motion to dismiss and strike the remedy of partial rescission. The circuit court held as a matter of law that Plaintiffs are not entitled to the remedy of partial rescission. The circuit court noted that it had previously granted summary judgment to DEPI and already ruled that forfeiture, cancellation, termination and removal were not proper remedies in this action. The circuit court further noted that rescission and forfeiture are similar equitable remedies and that rescission is not a proper remedy where a remedy at law exists. The circuit court also observed that although this Court has recognized rescission as a remedy in limited circumstances, including fraud by a lessee, abandonment and undue hardship on the lessor, none of those circumstances is present in this action and Plaintiffs presented no evidence of such.

During the hearing on February 23, 2006, attorney Ira S. Haught appeared as co-counsel for St. Luke's, where he serves as the Chairman of the Administration Counsel. After learning of DEPI's Offer of Judgment during the hearing, Mr. Haught negotiated a settlement with DEPI to allow drilling to proceed with respect to St. Luke's interest in the Flanaghan Lease. Mr. Haught proposed to Welch that she and St. Luke's divide the property in half with each to control the drilling on one-half. Welch rejected this proposal. DEPI and St. Luke's filed a separate partition action in August 2006, seeking to divide the mineral interests in half and thereby allow DEPI to proceed with drilling on St. Luke's half. On October 23, 2006, Plaintiffs sought to consolidate the Partition Action (06-C-53), with the underlying action. *See* Pls.' Mot. to Consolidate Cases (Oct. 23, 2006).[13]

While all Plaintiffs remain in this case, the petition for appeal was filed only by Welch in the circuit court on March 12, 2007.[14] Welch contends that she is only seeking review of the order entered by the circuit court on November 15, 2006, which granted DEPI's motion to dismiss and strike.

The apparent driving force behind this dispute is Jay-Bee. In this appeal, however, Jay-Bee does not join in the brief submitted by Welch, no doubt preferring to have a more sympathetic appellant than a competing business. Jay-Bee, however, remains a Plaintiff and has never sought dismissal of its claim to a valid top lease.

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[13]By order dated April 30, 2007, the circuit court denied Plaintiffs' Motion to Consolidate.

[14]St. Luke's has settled its claims against DEPI; however, the Court has not entered a dismissal order, and St. Luke's remains a party to this action. Contrary to the implication in footnote two of the Brief of Appellant, there was nothing improper about DEPI's settlement with St. Luke's. The person with whom DEPI's counsel negotiated was Ira Haught, who is and was an attorney of record in this action as well as being affiliated with St. Luke's.

III. STATEMENT OF THE FACTS

Although Welch contends that she is only seeking review of the circuit court's order granting DEPI's motion to dismiss and strike, her petition for appeal cites heavily to matters outside the amended complaint. *See* Br. of Appellant at pp. 25-31, 37-40. These matters include the report of Welch's expert witness Donald C. Kesterson, affidavits of Kesterson and Randy Broda, the President of Jay-Bee,[15] and deposition testimony of DEPI's expert witness Dr. Khashayar Aminian. Welch presented none of these matters to the circuit court in her opposition to the motion to dismiss and strike. Because Welch contends that she is only seeking review of the circuit court's order granting the motion to dismiss and strike, none of these matters should be considered in this appeal. Accordingly, this Court should strike and disregard the discussion of these matters and the entire contents of pages 25 through 31 and 37 through 40 in the Brief of Appellant.

IV. STATEMENT OF THE ISSUE

Whether this Court should affirm the circuit court's order because Welch is not entitled to the remedy of partial rescission since rescission is not proper where a remedy at law exists, and since in any event the amended complaint does not adequately plead nor has Welch offered evidence to prove fraud, abandonment or extreme hardship, and since DEPI has demonstrated a willingness to further develop the lease at issue and to protect the tract from drainage, and since the circuit court's unchallenged holding that Welch is not entitled to the remedy of forfeiture applies with equal force to the remedy of rescission.

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[15]Welch refers to Jay-Bee variously as Jay-Bee Production Company, Jay-Bee Production Company, Inc. and Jay-Bee Oil and Gas Production, Inc. in the Brief of Appellant. *Compare* Br. of Appellant at Caption *with* Br. of Appellant at p. 3 *with* Br. of Appellant at p. 28.

V. STANDARDS OF DECISION AND REVIEW

The standards of decision and review of motions under West Virginia Rule of Civil Procedure 12(b)(6) should apply to the extent that this Court reviews the circuit court's order granting the motion to dismiss or strike. A circuit court should dismiss an action pursuant to Rule 12(b)(6) when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Hampshire County Comm'n*, 216 W. Va. 499, 607 S.E.2d 828, Syl. Pt. 2 (2004) (*per curiam*). Accordingly, a motion to dismiss enables a court to weed out unfounded claims. *See Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996).

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516, Syl. Pt. 2 (1995).

To the extent that the circuit court considered matters outside the pleadings, the standards of decision and review of motions under West Virginia Rule of Civil Procedure 56 should govern. Rule 56 provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329, 336 (1995). "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.*, 459 S.E.2d

at 337 (citations omitted). The nonmoving party "may not rest upon mere allegation or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

This Court reviews a circuit court's grant of summary judgment *de novo*. *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737 (2000).

VI. DISCUSSION

A. This Court Should Affirm the Circuit Court's Order Because Welch Is Not Entitled to the Remedy of Partial Rescission.

If this Court does not dismiss the appeal for lack of jurisdiction, then it should affirm the circuit court's order because Welch is not entitled to partial rescission. Rescission is not proper where a remedy at law exists. In any event, the amended complaint does not adequately plead nor has Welch offered evidence to prove fraud, abandonment or extreme hardship, which are the only circumstances under which this Court has recognized a potential right to equitable relief.

1. Rescission is not proper where a remedy at law exists.

Welch is not entitled to the remedy of partial rescission because damages are an adequate remedy. Under West Virginia law, where a lessor leases land for oil and gas purposes, his remedy for the lessee's failure to further develop the leased premises, or to properly protect from drainage through wells on adjacent property is ordinarily through an action at law for damages rather than through an equitable remedy of forfeiture or rescission. *See Doddridge County Oil & Gas Co. v. Smith*, 154 F. 970, 979 (N.D.W. Va. 1907) (applying West Virginia law). This Court has held that equitable relief such as rescission is inappropriate in several cases involving oil and gas leases such as the one at issue in this action.

For example, in *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S.E. 128 (1902), an oil and gas lessor sought damages and a conditional decree canceling the lease except as to two areas on which the lessee had drilled producing oil wells, based on the lessee's alleged failure to protect the land against drainage of oil by wells on adjacent lands. *Id.*, 43 S.E. at 128. The circuit court granted the alternative decree of cancellation requested by the lessor. *Id.*, 43 S.E. at 129. Reversing, this Court held that the lessee's demurrer to the bill should have been sustained on the ground that the lessor's remedy, if any, was at law and not in equity. The Court reasoned that when oil is discovered and produced under an oil and gas lease, the lessee acquires a vested estate in the oil and gas underlying the property. *Id.*, 43 S.E. at 129[16] The Court concluded that the lessor's remedy for the lessee's breach of an implied covenant in the lease is ordinarily not by way of forfeiture (or rescission) of the lease in whole or in part, but by an action for the damages caused by the breach. *Id.* at Syl. Pt. 3.

Similarly, in *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S.E. 124 (1912), this Court affirmed a decree dismissing a bill for partial cancellation of an oil and gas lease held by the defendant. The Court articulated the well-established rule that a remedy at law is adequate as follows:

> *Failure or refusal, while occupying the lease and operating it, to drill additional wells, under circumstances imposing a duty to do so, makes the lessee liable in damages to the lessor, for which the remedy at law is held to be an adequate one by*

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[16]In this action, the Flanaghan Lease expressly provided as follows: "To have and to hold unto and for the use of the Lessee for the term of five years from the date hereof, and as much longer as oil or gas is produced in paying quantities or the rental paid thereon[.]" *See* DEPI's Memo. in Supp. of Summ. J. at Ex. A. Because there were earlier wells on the lease and there remain three active oil and gas wells on the lease, as the circuit court properly found, *see* Order at p. 3 (Nov. 15, 2006), DEPI's rights have vested.

> *courts in all jurisdictions, and affords no ground for either partial or total cancellation or rescission*, and this rule has been repeatedly asserted by this Court. In so far as this bill seeks cancellation for mere failure to drill additional wells, or to compel the drilling thereof, it is, therefore, clearly bad and insufficient on demurrer.

Id., 76 S.E. at 124-25 (citations omitted) (emphasis added).

In addition, in *Todd v. Manufacturers' Light & Heat Co.*, 90 W. Va. 40, 110 S.E. 446, 448 (1922), this Court held on certified question that the circuit court properly sustained the demurrer to a bill seeking partial cancellation of an oil and gas lease. The Court eloquently explained the reason for the rule:

> Ordinarily, the remedy for breach of the implied covenant relied upon is an action at law for damages, and there is no right in equity to have partial cancellation of the lease. . . . Admission of a lessor to a court of equity upon a bill containing only very general and indefinite allegations of breach of the covenant, upon the theory or presumption of possibility of establishment of the right to further development, by proof, would be obviously burdensome and oppressive. It would also relieve him from compliance with requirements of the rules of pleading. Obligation or duty impliedly imposed upon the lessee arises only when the conditions under which he is operating demand it for the protection of the interests of the lessor or realization of his just right under the lease. No duty to drill more than one well, in the absence of a stipulation for additional wells, is to be found in the lease itself. It arises out of facts and circumstances to be set up in addition to the terms and provisions of the lease and such facts and circumstances do not always exist. The lessor cannot be deemed to have a cause of action arising out of the implied covenant, in the absence of a disclosure by his bill, of the existence of the peculiar facts and circumstances imposing duty to drill additional wells.

Id., 110 S.E. at 448 (citations omitted).

In this action, the circuit court noted in the order granting the motion to dismiss and strike that it previously granted summary judgment to DEPI and ruled that forfeiture, cancellation, termination and removal were not proper remedies in this action. The circuit court further noted that rescission and forfeiture are similar equitable remedies and that rescission is not a proper remedy where a remedy at law exists. Indeed, in *Hall*, which was one of the cases upon which the circuit

court relied in granting the motion to dismiss or strike, this Court expressly considered the remedy of rescission, but held that it was not available because damages were adequate. Welch has expressly stated that she does not dispute the circuit court's ruling with regard to forfeiture. *See* Br. of Appellant at p. 40. That ruling applies with equal force to the comparable equitable remedy of rescission under *Hall*.

2. The amended complaint does not adequately plead and Plaintiffs offered no evidence to prove fraud, abandonment or extreme hardship.

None of the circumstances recognized by this Court as creating a possible remedy of rescission is present in this action. In *Adkins v. Huntington Development & Gas Co.*, 113 W. Va. 490, 168 S.E. 366, 367 (1932), this Court recognized a lessor's right to cancellation of an oil and gas lease on the ground of abandonment and upon circumstances of fraud or extreme hardship. In that case, evidence established that the lessee was draining gas from the leased premises through the lessee's other wells on adjacent property, which the lessee owned in fee. The Court held:

> Where, in a suit in equity by a lessor, the allegations and proof show with reasonable certainty a fraudulent drainage of gas in substantial quantities from the leased premises, through a well operated by and on adjacent property belonging to the lessee, the latter may be compelled to sink an offset well on said premises, or submit to a forfeiture of all, except an acreage around the well theretofore drilled under the lease.

Id. at Syl. Pt. 2.

The Court in *Adkins* made it clear that the remedy of forfeiture may be used as a last resort only, and it modified the circuit court's order as follows:

> Therefore, the decree must be modified so as to require the drilling of an off-set well, or the payment of $300 per year in lieu thereof, until such time as such a well is drilled, or the lease abandoned, or in case neither is done, that the lease be canceled as to all the property, with the exception of the designated acreage around the present well[.]

Id., 168 S.E. at 369.[17] The *Adkins* decision was determined upon a finding of fraud, which is clearly not the case with DEPI. DEPI has not drilled wells on adjacent tracts and its offers to drill have been rejected by Welch. Importantly, the Court preserved the right for the lessee to drill, and only if the lessee chose not to drill or abandon the lease was the possible option of a partial cancellation of the lease to even by considered by the trial court.

Welch's argument that the cases upon which the circuit court relied should be reevaluated in light of West Virginia Code Section 22C-9-1 is without merit.[18] This Court rejected a similar argument in *Powers v. Union Drilling, Inc.*, 194 W. Va. 782, 461 S.E.2d 844 (1995). In that case, the appellants argued that in light of the enactment of the oil and gas conservation statutes now found in West Virginia Code Chapter 22C, the applicability of the common law rule of capture was "highly suspect." This Court disagreed, reasoning that the rule of capture has a longstanding history in West Virginia and that the statutory provisions in Chapter 22C do not supersede or eviscerate the common law rule. The Court noted that the plaintiffs in that case did not seek the administrative remedies set forth in Chapter 22C, but instead chose to bring suit under a common law trespass theory. In so doing, they subjected themselves to the common law rule of capture. *Id.*, 461 S.E.2d at 849.

In this action as well, Section 22C-9-1 does not supercede or eviscerate the common law relied on by the circuit court in granting the motion to dismiss and strike and dismissing the equitable

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[17]Welch concedes that the rule in *Adkins* is applicable to her demand for the remedy of rescission, but she asserts that rescission is a different remedy from forfeiture and cancellation. Br. of Appellant at pp. 20-21. Even Welch's definitions of these terms, however, which are taken from a superseded edition of *Black's Law Dictionary*, recognize that forfeiture "is a comprehensive term[.]" Br. of Appellant at p. 21.

[18]Section 22C-9-1(a)(1) provides that it is the public policy of the state and in the public interest to "[f]oster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources[.]"

remedy of rescission. Welch does not seek an administrative remedy under Chapter 22C, but instead claims common law breach of implied duties under the lease agreement. In so doing, she has subjected herself to the common law rules applied by the circuit court in granting the motion to dismiss and strike.

The cases cited from other jurisdictions cited by Welch are similarly of no avail. For example, in *Sauder v. Mid-Continent Petroleum Corporation*, 292 U.S. 272, 54 S. Ct. 671, 78 L. Ed. 1255 (1934), the question the Supreme Court considered was whether the respondent failed to comply with an implied covenant to develop a tract with reasonable diligence. *Id.*, 292 U.S. at 278. In that case, on the date of the expiration of the fixed term of the lease, the petitioner wrote the respondent stating that the lease had expired, and adding that he understood that the respondent should either operate or release all tracts on which wells were not being operated. *Id.*, 292 U.S. at 276. The respondent stated that it desired to hold the tract because it may contain oil, but further asserted that it had no present intention of drilling at any time in the near or remote future. *Id.*, 292 U.S. at 281. The Supreme Court held that the respondent's attitude did not comport with the obligation to prosecute development with due regard to the interests of the lessor. *Id.* In order to recognize and protect the equities of both parties, however, the Supreme Court remanded the case to the district court with instructions that a decree should be entered canceling the lease as to the allegedly underused portion of the tract identified in the lease *unless* within a reasonable time an exploratory well should be drilled therein. *Id.* at 282. Here, DEPI is willing to drill, but Welch has objected.

In addition, although *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 814 (8th Cir. 1905), which is both cited in *Sauder* and relied on by Welch, recognized an implied covenant to continue with

reasonable diligence the work of exploration, development and production and adopted a reasonably prudent operator standard for its breach, the court did not hold that forfeiture was an appropriate remedy in that case. Indeed, the court stated in *Brewster* that the lessor would be entitled to relief only in the event that upon remand the equities were strong enough to overcome the general indisposition of courts of chancery towards aiding in enforcement of forfeitures. *Id.* at 820.

This Court has cited to *Brewster* on two occasions, refusing to find a forfeiture each time. For example, in *Horse Creek Coal Land Co. v. Trees*, 75 W. Va. 559, 84 S.E. 376 (1915), which involved an oil and gas lease that was allegedly underdeveloped, the Court held that equity will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition because in such a case the party is left to his legal remedy. The Court distinguished *Brewster* and in addition held as follows:

> Besides, the principles of the *Brewster* Case, as to enforcement of forfeitures, do not accord with the views expressed by this court in *Craig v. Hukill*, 37 W. Va. 520, 16 S.E. 363.

Id., 84 S.E. at 378.

In *Craig v. Hukill*, 37 W. Va. 520, 16 S.E. 363 (1892), the case identified in *Horse Creek Coal Land Co.* as incompatible with *Brewster*, this Court refused to enforce a forfeiture of an oil and gas lease. In reaching this conclusion, the Court reasoned:

> Affirmative relief against penalties and forfeitures was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised; and it would be going in the very opposite direction, and acting contrary to its essential principles, to affirmatively enforce a forfeiture.

Id., 16 S.E. at 364.

Carroll Gas & Oil Company v. Skaggs, 231 Ky. 284, 21 S.W.2d 445 (1929), upon which Welch also relies, is readily distinguishable. In *Skaggs*, the court articulated the general rule that where one party to a contract abandons it and refuses further performance, the other party is entitled to rescind, but he may alternatively keep the contract alive and sue upon it for a breach, or he may adopt a middle course and treat the contract as at an end for further performance, but still alive for the purpose of adjudicating the rights of the parties as to the breach. *Id.*, 21 S.W.2d at 451. Because there had clearly been an abandonment, the plaintiffs in that case were authorized to treat the contract as at an end, which terminated their right to recover damages arising in the future, and seek only an adjustment of the rights of the parties growing out of the breach. *Id.*[19]

In *Holderby v. Harvey C. Taylor Co.*, 87 W. Va. 166, 104 S.E. 550 (1920), this Court held that the plaintiffs had no right to rescission. In *Holderby*, the Court explained:

> Rescission is a creature of equity, and will not be granted where to do so would produce an unjust result. It is the reverse of specific performance. It is not permitted for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat the very object of the contract, and in practically all cases of rescission it is held that restoration of the status quo is an essential prerequisite to the right to rescind. If the situation of the parties has been so changed, by a partial performance of the contract, or by their making arrangements for carrying it out, or by their actions taken in reliance upon its expected execution, that they cannot be restored, without loss, to their former situation, as if the contract had not been made, a rescission cannot be had.

Id., 104 S.E. at 552. In this action, the amended complaint does not adequately plead nor does Welch submit evidence that could prove fraud, abandonment or extreme hardship, which are the only circumstances under which this Court has recognized a potential right to equitable relief. Welch

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[19]It should be noted that this Court has cited to *Skaggs* in support of the simple rule that in cases involving claims for damages for drainage the measure of damages is the diminution of the royalties by reason of such drainage. *See Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626, 637 (1962).

does not even argue that she has met the pleading standard for fraud under West Virginia Rule of Civil Procedure 9(b). At any rate, the circuit court correctly found that Plaintiffs have not alleged fraud with the particularity required by West Virginia Rule of Civil Procedure 9(b), nor with the sufficiency to meet the requirements for a remedy of rescission.

In addition, Welch has not pled abandonment under West Virginia Code Section 36-4-9a[20] or common law. Moreover, the circuit court properly found no evidence of lease abandonment because EnerVest is currently operating three active oil and gas wells on the lease.

Although Welch alleges extreme hardship, she offered no evidence of such to oppose summary judgment. DEPI has attempted and offered to drill on Welch's property, but such attempts and offers have been thwarted by Welch's motions for preliminary injunction and motion to strike the offer of judgment. The circuit court correctly found that Plaintiffs offered no evidence of extreme hardship.[21]

3. This Court should strike portions of the Brief of Appellant that refer to matters outside the appropriate record.

This Court should strike portions of the Brief of Appellant because they are not within the appropriate record in this interlocutory appeal. Although Welch contends that she is only seeking review of the circuit court's order granting DEPI's motion to dismiss and strike, her Brief of

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[20]Section 36-4-9a creates a rebuttable presumption of an intention to abandon an oil and gas well under certain circumstances.

[21]Should this Court wish to construe the term extreme hardship, which is more general than the terms abandonment and fraud, it should be construed in accordance with the rule of *ejusdem generis*. Under that rule, where general words follow a list of particular things, the general words will be construed as applicable only to things of the same general nature or class as those listed, unless an intention to the contrary is clearly shown. *See Ohio Cellular RSA Ltd. P'ship v. Board of Pub. Works*, 198 W. Va. 416, 481 S.E.2d 722, Syl. Pt. 4 (1996).

Appellant cites to matters outside the amended complaint. *See* Br. of Appellant at pp. 25-31, 37-40. These matters include the report of Welch's expert witness Donald C. Kesterson, affidavits of Kesterson and Randy Broda, the President of Jay-Bee Production Company, and deposition testimony of DEPI's expert witness Dr. Khashayar Aminian. While Welch did present the affidavits of Kesterson and Broda to the circuit court in opposition to DEPI's motion for summary judgment, she presented none of these matters to the circuit court in her opposition to the motion to dismiss and strike. Accordingly, Welch could only properly cite to these matters on appeal from the order granting DEPI's motion for summary judgment. Welch has not contested the validity of the order granting summary judgment.

Appellate review is limited to the record in the trial court. *United States v. Anderson*, 481 F.2d 685, 702 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974) (holding that any reference to material not in the record for appeal is both improper and censurable). When a party to an appeal refers in a brief to matters that are not part of the record, the appropriate response is a motion to strike. *See* John Bursch, *Striking Nonrecord Evidence*, Mich. B.J. 28 (May 2002). *Cf. Stotler & Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988) (dismissing appeal for failure to file timely brief where appellant originally filed brief that referred to evidence never submitted to district court, brief was returned to appellant for removal of such references with deadline for refiling which appellant failed to meet).

DEPI has filed a motion to strike in this action. Because Welch contends that she is only seeking review of the circuit court's order granting the motion to dismiss and strike, none of these matters should be considered in this appeal. Accordingly, this Court should strike and disregard the discussion of these matters and the entire contents of pages 25 through 31 and 37 through 40 in the Brief of Appellant.

a. Partial rescission is not appropriate because DEPI has demonstrated a willingness to further develop the lease by attempting and offering to drill.

In the event this Court reviews this separate "evidence" not properly submitted by Welch, Welch's reliance on *dicta* in *Adkins* to support her argument that partial rescission is an appropriate remedy simply because further development would be profitable is misplaced. This Court held only that forfeiture may be appropriate in cases of fraud, abandonment and extreme hardship. *Adkins*, 168 S.E. at 367. *Adkins* did not suggest that a plaintiff could be entitled to relief in the absence of these circumstances. In fact, the Court emphasized that it was not so holding and stated that the major emphasis was placed upon the fraudulent drainage of plaintiffs' land. *Id.*, 168 S.E. at 368.

The fraud alleged in *Adkins* was described by the Court as follows:

> In the instant case, the bill, in addition to setting out the facts heretofore mentioned, charges fraud on the part of the defendant company in denying plaintiffs' importunities for the drilling of additional wells to further test their land and to protect their premises from drainage through wells on contiguous lands in the production of which they also charge *the company had full knowledge thereof, and had an interest therein, from which drainage it profited and was benefited*; that, by reason of said drainage permitted by it, said defendant fraudulently refrained from and refused to make further effort to protect their land against the drainage, or to properly develop the premises for the mutual advantage of the lessors and the lessee, by drilling a sufficient number of additional wells thereon. It is further alleged that the defendant company, after the discovery of gas in paying quantities as aforesaid, fraudulently *ignored its obligations and the implied covenants under the terms of said lease, and continued to drain the premises in greater volume by the use of its powerful pumping station*, which tends to increase production of wells on adjacent premises and to drain the premises more speedily; compensation for which injury the plaintiffs allege is not ascertainable, and therefore not measurable in damages in an action at law.

Id., 168 S.E. at 367 (emphasis added).

Far from the allegations in *Adkins*, the language quoted from Mr. Kesterson's report in the Brief of Appellant does not indicate that DEPI had knowledge of any drainage, and it affirmatively

states that "other operators," not DEPI, benefitted from any drainage. Indeed, the language quoted does not state unequivocally that drainage occurred, but only opines that an unspecified number of "recent off-set developments . . . could be draining natural gas and crude oil reserves". Br. of Appellant at p. 27.

In addition, Dr. Aminian's quoted testimony that he would not recommend that DEPI drill further given its exploration engineering parameters is irrelevant in light of the fact that DEPI has attempted and offered to drill. Further, Welch's argument that Dr. Aminian's testimony is analogous to the testimony of the lessee's production superintendent in *Carter v. U.S. Smelting, Refining & Mining, Co.*, 1971 OK 67, 485 P.2d 748 (1971), is specious. As a mere expert witness, Dr. Aminian has no authority to speak for or otherwise bind DEPI in this action. Dr. Aminian's testimony that he would not recommend drilling is inapposite to the question of whether DEPI intends to drill. The fact that DEPI intends to drill is demonstrated by its actions in attempting and offering to drill during the course of this action.

Moreover, this action is readily distinguishable from *Carter* in an important respect. In that case, the court observed:

> More than 30 days prior to the commencement of the action, *Plaintiffs demanded in writing* that United States Smelting, Refining and Mining Company (Defendant) execute a release of the Carter lease, except the producing well location or that Defendant, within 30 days *commence operations for drilling another well* on the leased premises and for drilling an offset well . . . . *This demand was rejected.*

Id., 485 P.2d at 749 (emphasis added).[22]

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[22]It should be noted that the court upheld the trial court's implied finding that the plaintiffs did not suffer any drainage. *Id.*, 485 P.2d at 754.

A demand by the lessor to drill, which was rejected by the lessee, as is found in the cited cases, is also a distinguishing factor in *Carter v. Arkansas Louisiana Gas Co.*, 213 La. 1028, 36 So. 2d 26 (1948). In that case, the court explained:

> More than 90 days prior to the filing of the instant suit, plaintiffs made demand on the defendant for further development or for cancellation of the lease, which was refused, defendant taking the position that the property has been sufficiently developed. The record does not disclose that defendant has any present or future plans to develop this property further, and the evidence convinces us, as it did the trial court, that defendant has no intention of making any further development.

Id., 36 So. 2d at 28. *See also, e.g., Hodges v. Mud Branch Oil & Gas Co.*, 270 Ky. 206, 109 S.W.2d 576 (1937) (holding that because lessor's witnesses expressly stated there was no intention to drill further, the lease was abandoned); *Harris v. Morris Plan Co.*, 144 Kan. 501, 61 P.2d 901 (1936) (holding that assignee of oil and gas lease was not entitled to complain of forfeiture where demand for future development had been ignored, and assignee made no pretense that further development would be made if opportunity were afforded); *Nunley v. Shell Oil Co.*, 76 So. 2d 111 (La. App. 1954) (petition alleged that formal demand for development or alternatively cancellation and release thereof had been made upon defendant, which demand had been refused).

Welch's reliance on *Imperial Colliery Company v. Oxy USA Inc.*, 912 F.2d 696 (4th Cir. 1990), is similarly misplaced. In *Colliery Company*, the court upheld the district court's finding that a lease with fourteen wells failed to produce in paying quantities in violation of a lease agreement. The lessor, who owned part of a larger tract of land which was all subject to a lease, contended that the lessee continued operation of unprofitable wells because the lessee's contract with a third party for gas sold from the entire tract was made more profitable if the lessee sold the lessor's gas at a loss.

Id. at 699.[23] The court recognized that courts consider the lessee's good faith in the context of sporadically or marginally producing wells. *Id.* (citing *Clifton v. Koontz*, 160 Tex 82, 325 S.W.2d 684, 691 (1959) ("In the case of a marginal well, . . . the standard by which paying quantities [are] determined is whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate. . . ."). The court concluded, however, that the lessee did not assert that its wells were even marginal such as to trigger an inquiry into its good faith. *Id.*[24]

In this action by contrast, Welch made no demand that DEPI commence drilling. In fact, Welch has thwarted attempts and offers by DEPI to drill until after suit was filed. There can be no question that DEPI is operating in good faith under the Flanaghan Lease and that gas is being produced from the existing wells in paying quantities.

b. Partial rescission is not appropriate because DEPI has protected the tract from drainage by attempting and offering to drill.

Similarly, partial rescission is not appropriate because DEPI has made sufficient efforts to protect the tract from drainage by offering to drill. Contrary to her argument, this Court's decision in *Todd v. Manufacturers' Light & Heat Co.*, 90 W. Va. 40, 110 S.E. 446, 448 (1922), does not assist Welch. As discussed above, the Court held on certified question that the circuit court properly sustained the demurrer to a bill seeking partial cancellation of an oil and gas lease. In that case, the

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[23]By mixing the lessor's lower priced gas with higher priced gas from new wells, the lessee could charge the third party a lower overall price, thus not jeopardizing its profitable relationship with the third party. *Id.*

[24]Welch has raised the issue of whether DEPI breached this term of the Flanaghan Lease for the first time in the Brief of Appellant. This Court has held that issues not raised in the trial court and first raised on appeal are considered waived. *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W. Va. 492, 345 S.E.2d 791, 798-99 (1986); *Bell v. West*, 168 W. Va. 391, 284 S.E.2d 885, 888 (1981).

Court held that to avoid a demurrer the bill must state facts showing with reasonable certainty drainage in substantial quantities. *See Id.*, 110 S.E. at 448. *See also Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S.E. 124 (1912).

Moreover, in *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 80 S.E. 368 (1913), which was relied on by the circuit court in granting the motion to dismiss and strike, this Court held:

> *[I]f he fraudulently fails or refuses to conduct such further operations, equity will, at the suit of the lessor, decree either total or partial cancellation of the lease, according to the facts and circumstances averred and proved.*

Id. at Syl. Pt. (emphasis added). Clearly, the allegation of fraud was the determining factor in *Jennings*, as shown by the fact that on a subsequent appeal this Court reversed a finding for the plaintiff and dismissed the bill on the ground that the proof did not sustain the allegations. *See Jennings v. Southern Carbon Co.*, 81 W. Va. 347, 94 S.E. 363 (1917).

In this action, the amended complaint does not allege and Plaintiffs offered no evidence to prove facts showing with reasonable certainty drainage in substantial quantities. Moreover, the drainage with which this Court has been concerned has always been fraudulent drainage such as the drainage found in *Adkins* where the same lessee chose to benefit itself by producing from its own adjoining acreage. Manifestly, there are no allegations or proof of fraudulent drainage since DEPI does not operate the wells on adjacent properties.

B. The Circuit Court's Unchallenged Order Granting DEPI's Motion for Summary Judgment and Holding That Welch Is Not Entitled to the Remedies of Forfeiture, Cancellation and Termination Applies with Equal Force to the Remedy of Rescission.

Finally, this Court should affirm the circuit court's order because it properly held that rescission and forfeiture are similar equitable remedies and noted that it previously granted summary

judgment to DEPI on the grounds that forfeiture, cancellation, termination and removal were not proper remedies in this action. Welch does not dispute the circuit court's ruling on summary judgment, but argues without any proper support that rescission is the appropriate remedy.

The only authority Welch uses in an attempt to support her argument is an excerpt from the transcript of the hearing on summary judgment. Of course, Welch's references to the hearing transcript in the Brief of Appellant are improper. "It is a paramount principle of jurisprudence that a court speaks only through its orders." *Legg v. Felinton*, 219 W. Va. 478, 637 S.E.2d 576, 581 (2006) (citation omitted).

In any event, the circuit court did not suggest in the transcript of the hearing that Welch had a remedy in rescission. Instead, the circuit court made the following statement:

> This court read both memorandums [sic] supplied by counsel, and it is not aware of any case law in this state under the current fact situation which was undisputed – the three wells are producing and have been paying throughout the life of the lease – that would entitle the plaintiffs to any relief for forfeiture. . . .
>
> The court agrees with the defendant that under the language of the complaint the appropriate relief would be monetary relief rather than forfeiture for the implied covenant.
>
> The court does believe the plaintiff does have the right to seek enforcement of the implied covenants to fully develop the lease as to the implied covenant to prevent drainage of the leasehold assets.

Tr. at pp. 10-1 (Jan. 26, 2005).

This finding, which precluded the remedy of forfeiture, also precludes the remedy of rescission. Where there are undisputedly three wells still producing and paying, there cannot be an abandonment to justify rescission. If the circuit court suggested during the hearing that Welch may be entitled to any remedies, those remedies were limited to damages and specific enforcement of the

implied covenants to fully develop the lease and to prevent drainage. Specific enforcement of the implied covenants would require DEPI to drill additional wells on the Flanaghan Lease. The amended complaint contains a demand for damages, which is still pending before the circuit court, but does not demand specific enforcement of the implied covenants.

As noted above, however, the cases cited by Welch have enforced the lease in the first instance by requiring the lessee to drill and only authorized a forfeiture in the event that the lessee continued to refuse to drill. *See, e.g., Sauder*, 292 U.S. at 282 (recognizing and protecting the equities of both parties by instructing that a decree cancel the lease as to the allegedly underused portion of the tract unless within a reasonable time an exploratory well was drilled); *Adkins*, 168 S.E at 369 (modifying decree to require drilling of offset well, or payment of $300 per year in lieu thereof, until well drilled or lease abandoned, and if neither done, to cancel lease as to all property except acreage around present well).

In this action, DEPI has attempted to and demonstrated a willingness to drill additional wells on Welch's property. Its efforts have been met with two separate motions for preliminary injunction to prevent drilling and a motion to strike an offer of judgment. While not an Appellant, Jay-Bee, Plaintiff below and represented by the same counsel as Welch, does indeed have a particular interest in the remedy of rescission sought by Welch on appeal. Jay-Bee will not be permitted to drill on Welch's property unless the Flanaghan Lease is rescinded. Welch, however, should be indifferent as to whom drills additional wells. Instead, she has inexplicably refused to seek the remedy of enforcement, and she has made substantial efforts to thwart DEPI's efforts to drill.

As a matter of equity, this Court should not permit Jay-Bee to hide behind Welch and surreptitiously gain the benefits of the impermissible relief sought by her.

VII. CONCLUSION

For all of the foregoing reasons, if this Court retains jurisdiction over this appeal, it should affirm the circuit court's order granting the motion to dismiss and strike the remedy of rescission.

Dated this 10th day of March 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2008, I caused to be served the foregoing "Brief of Appellee" upon the following counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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